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SUPREME COURT, U.S.

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SUPREME COURT OF THE UNITED STATES

HOWARD L. GIFFORD,
Petitioner/Appellant
vs.
ROBERT O. TIERNAN, CHAIRMAN, FEDERAL ELECTION COMMISSION,
Appellee.

APPENDIX

APPENDIX

LOWER COURT DECISIONS

MARCH 4, 1982	U.S. Court of Appeals 9th Circuit	No. 80-4211
APRIL 16, 1980	U.S. District Court Eastern District of California	No. S-80-13 LKK
AUGUST 27, 1979	U.S. District Court Eastern District of California	No. S-78-249

Memorandum and Order of Senior Judge Thomas J. MacBride (The action presents a justiciable case of controversy.), page 9, lines 23 through 25, which satisfies the requirement of USC Title 2, Chapter 14, Section 437h, Judicial Review.

DATED: May 3, 1982

Howard L. Gifford
HOWARD L. GIFFORD, In Pro Per, In FORMA PAUPERIS

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CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD L. GIFFORD, Petitioner/Appellant, vs. ROBERT O. TIERNAN, Chairman, Federal Election Commission, Respondent/Appellee.	No. 80-4211 D.C. No. CIV S 80-314 LKK OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding
Argued and submitted October 13, 1981

Before: ANDERSON and NELSON, Circuit Judges, and FITZGERALD,* District Judge

NELSON, Circuit Judge:

Howard Gifford, proceeding in forma pauperis, challenged the constitutionality of a section of the Federal Election Campaign Act of 1971 (FECA) that defines persons subject to regulation as federal "candidates."[1] Appellant argued that Congress had "exceeded its authority to oversee the private citizen who receives contributions with a view to being a Federal candidate."

The district court dismissed the claim as frivolous within the meaning of 28 U.S.C. § 1915(d) (1976), which provides that "[t]he court . . . may dismiss [cases filed in forma pauperis] if . . . satisfied that the action is frivolous or malicious." Gifford was given leave to bring an appeal in forma pauperis.

Two issues are presented by this appeal: (1) whether the district court may dismiss a claim as frivolous within the meaning of 28 U.S.C. § 1915(d) (1976), rather than certifying

*The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

that claim to the court of appeals for expedited en banc review pursuant to 2 U.S.C. § 437h (Supp. III 1979)[2]; and (2) assuming that such a dismissal is proper, whether appellant's claim was properly dismissed as frivolous? We hold that claims dismissed as frivolous pursuant to section 1915(d) need not be certified to the court of appeals for expedited en banc review and that the district court was correct in dismissing appellant's claim as legally frivolous.[3]

1. EFFECT OF EXPEDITED REVIEW PROVISION

The first question presented by this appeal is whether the expedited review procedure of 2 U.S.C. § 437h (Supp. III 1979) requires the certification of questions of the Act's constitutionality for expedited en banc review, where the district court deems those questions frivolous under 28 U.S.C. § 1915(d) (1976). Section 437h provides in part that "[t]he district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals . . . ." 2 U.S.C. § 437h(a) (Supp. III 1979)(emphasis added). We agree with the district court's conclusion in an earlier case involving appellant, Gifford v. Congress, 452 F. Supp. 802 (E.D. Cal. 1978) (Gifford I), that this apparently absolute language of section 437h was not intended to permit certification of frivolous claims.

In reaching this conclusion, the district court in Gifford I thoroughly examined the legislative history and the reported cases construing the operation of section 437h.[4] We note here that in introducing the legislation that became section 437h, its sponsor indicated that it was intended to provide expedited review of "serious" questions as to the Act's constitutionality. 120 Cong. Rec. 10562 (1974)(remarks of Sen. Buckley), reprinted in Federal Elections Commission, Legislative History of Federal Election Campaign Act Amendments

of 1974, at 499 (1977) [hereinafter cited as 1974 Legislative History]. Moreover, the Conference Committee limited the reach of the section by reducing its scope from actions brought to implement or to construe the provisions of the Act, to actions brought "to construe the constitutionality of the Act." Conference Report on Federal Election Campaign Act Amendments of 1974, H.R. Rep. No. 1438, 93d Cong., 2d Sess. 96 (1974), reprinted in 1974 Legislative History at 1040. Thus, we agree with the court in Gifford I that the legislative history provides a strong argument that Congress intended to exclude constitutional claims of dubious merit from the reach of the statute.

Following its examination of the legislative history of section 437h, the Gifford I court reviewed judicial constructions of the reach of the section; the court determined that the cases provide additional support for the position that section 437h was not intended to require certification of frivolous claims.[5] Id. at 807-10. Here, too, we agree with the court in Gifford I and we note that this position is strengthened substantially by the Supreme Court's decision last Term in California Medical Association v. Federal Election Commission, ___ U.S. ___, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981). The Court there stated that "[W]e do not construe § 437h to require certification of constitutional claims that are frivolous." Id. at ___ n.14, 101 S. Ct. at 2720 n.14, 69 L. Ed. 2d at 578 n.14 (dictum) (citing Gifford I).[6]

We therefore hold that 2 U.S.C. § 437h (Supp. III 1979) does not require certification for expedited review of claims dismissed as frivolous under 28 U.S.C. § 1915(d) (1976).

II. DISMISSAL AS FRIVOLOUS

District court dismissals of claims as legally frivolous pursuant to 28 U.S.C. § 1915(d) (1976) are reviewed under the

abuse of discretion standard. Torres v. Garcia, 444 F.2d 537, 537 (9th Cir. 1971)(per curiam); Williams v. Field, 394 F.2d 329, 332 (9th Cir.), cert. denied, 393 U.S. 891, 89 S. Ct. 213, 21 L. Ed. 2d 171 (1968). In the case before us, the district court relied upon the reasoning of Gifford I, 452 F. Supp. at 803-06, in dismissing appellant's present claim as frivolous. We agree that this reasoning supports the determination of the court below.[7] The dismissal of this action was not an abuse of discretion.

AFFIRMED.

FOOTNOTES

1. The section of the Act of which appellant complained, provided that:

> "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office . . . .

Federal Election Campaign Act of 1971, Pub. L. 92-225, Title III, § 301(b), 86 Stat. 11 (1972)(amended January 8, 1980)(current version at 2 U.S.C. § 431(2) (Supp. III 1979)). The statutory language that appellant seeks to have this court declare invalid was amended effective January 8, 1980, prior to the filing of this action on March 19, 1980. The present action does not appear moot, however, because it is subject to the same alleged constitutional infirmity, i.e., Congress has exceeded its power to regulate federal elections. In any event we assume that, had the district court not dismissed appellant's claim as frivolous, it would have granted leave to amend the complaint to challenge the constitutionality of the section as then in force.

2. Section 437h provides in relevant part:

> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h(a) (Supp. III 1979).

3. In light of our disposition of this case, appellant's petition for mandamus is denied as moot.

4. In addition, the Gifford I court noted that the absence of an initial district court screening of in forma pauperis attacks under section 437h would subject the expedited review procedure to clear abuse by litigants. Id. at 810. Additional support for this position may be found in California Medical Ass'n v. Federal Election Comm'n, 641 F.2d 619, 632, 639 (9th Cir. 1980)(en banc), aff'd, ___ U.S. ___, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981); Federal Election Comm'n v. Lance, 635 F.2d 1132, 1137 (5th Cir.)(en banc), cert. denied and appeal dismissed, ___ U.S. ___, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981); see Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345, 384-87 (1977). But see California Medical Ass'n v. Federal Election Comm'n, ___ U.S. ___, ___ nn.13 & 14, 101 S.Ct. 2712, 2720 nn.13 & 14, 69 L. Ed. 2d 567, 577-79 nn.13 & 14 (1981).

5. After the decision in Gifford I, other courts have continued to grapple with section 437h, but their decisions provide us with little additional assistance. In what is perhaps the most helpful of these cases, Mott v. Federal Election Comm'n, 494 F. Supp. 131 (D.D.C. 1980), the court held that, despite the mandatory phrasing of section 437h, district courts need not certify automatically every constitutional question raised. Id. at 133. The Mott court noted that other courts had held that neither unripe nor frivolous constitutional questions need be certified. Id. at 134 (citing Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375 (D.C. Cir.), cert. denied, 449 U.S. 754, 101 S. Ct. 360, 66 L. Ed. 2d 218 (1980)(unripe questions); Gifford v. Congress, 452 F. Supp. 802 (E.D. Cal. 1978)(frivolous questions)). It then dismissed the complaint as unripe as to one plaintiff and as not "substantial" as to another plaintiff, because the latter's claims had been decided previously by the Supreme Court. Id. at 135-37.

The principal court of appeals opinions announced after Gifford I was decided are less helpful. E.g., California Medical Ass'n v. Federal Election Comm'n, 641 F.2d 619, 631-32 (9th Cir. 1980)(en banc), aff'd, ___ U.S. ___, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981) (hearing a challenge to the constitutionality of FECA limits on contributions to a political action committee under Fed. R. App. P. 35, rather than under section 437h of FECA, because delicate questions including the extent to which the breadth of the statutory phrase "all questions of constitutionality" may trench upon a court's independence in the manner and scope of its decisionmaking are to be decided only when necessary); Bread Political Action Comm. v. Federal Election Comm'n, 635 F.2d 621, 626 n.6 (7th Cir. 1980)(en banc), juris. postponed, ___ U.S. ___, 101 S. Ct. 3157, 69 L. Ed. 2d 1004 (1981)(unnecessary to decide whether section 437h requires certification of all constitutional questions regardless of substantiality because, in contrast to Mott, questions presented were "substantial"); Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 378, 392 (D.C. Cir.), cert. denied, 449 U.S. 754, 101 S. Ct. 460, 66 L. Ed. 2d 218 (1980) (dismissing complaint on ripeness grounds and therefore not reaching the issue of the scope or applicability of section 437h).

6. It is not entirely clear whether this statement by the Supreme Court refers solely to claims classified as "frivolous" within the meaning of 28 U.S.C. § 1915(d). While Gifford I clearly deals with dismissals of in forma pauperis complaints as frivolous, the Supreme Court's footnote follows with a Cf. signal and a citation to California Water Service Co. v. City of Redding, 304 U.S. 252, 254-55, 58 S. Ct. 865, 866-67, 82 L. Ed. 1323, 1325 (1938)(per curiam). Although there is no explanatory parenthetical to aid us in drawing the suggested

comparison, California Water Service deals with dismissals of claims where no substantial federal question is presented, either because the claim is "obviously without merit or because its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject." Id. at 255, 58 S. Ct. at 867, 82 L. Ed. at 1325. This footnote in California Medical Ass'n thus suggests that the Supreme Court considers dismissals as frivolous pursuant to 28 U.S.C. § 1915(d) to be analogous to, but not identical with, dismissals for lack of a substantial federal question.

Further evidence that the Court feels that "insubstantial" questions need not be certified may be found in footnote 13 of the Court's opinion in California Medical Ass'n; the Court said there that "the Federal Election Campaign Act is not an unlimited fountain of constitutional questions, and it is thus reasonable to assume that resort to § 437h will decrease in the future." ___ U.S. at ___ n.13, 101 S.Ct. at 2720 n.13, 69 L. Ed. 2d at 578 n.13. This implies that district courts have the ability to dismiss insubstantial challenges to the constitutionality of FECA, i.e., where the issues have already been decided by the Supreme Court.

7. The law of this circuit with respect to the definition of "frivolous" for purposes of section 1915 (d) is unsettled. Franklin v. Oregon, 662 F.2d 1337, 1340 n.1 (9th Cir. 1981)(dictum). This appeal does not present the issue of what this Circuit's definition of frivolous claims pursuant to 28 U.S.C. § 1915(d) (1976) should be. We note that the district court in Gifford I considered definitions of "frivolous" employed in other circuits and determined that under any of these standards "and despite viewing plaintiff's pro-per complaint in its most favorable light," Gifford's complaint was frivolous. 452 F. Supp. at 804.

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CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY _____ DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HOWARD L. GIFFORD,

Plaintiff,

v.

ROBERT O. TIERNAN,
Chairman Federal Election
Commission,

Defendant.

MISC. NO. S-80-13 LKK

ORDER

Plaintiff has applied for leave to proceed in forma pauperis. Under 28 U.S.C. § 1915(d), a case brought in forma pauperis may be dismissed "if the allegation of poverty is untrue, or if...the action is frivolous or malicious." A recitation of the procedural history of this action demonstrates that (a) plaintiff should be granted leave to proceed in forma pauperis and (b) the action must be dismissed as frivolous.

Plaintiff filed a similar action in this court in 1978. See Howard L. Gifford v. The Congress, Civil S-78-249. Judge MacBride granted in forma pauperis status and dismissed the action because it was legally frivolous. See Gifford v. Congress (E.D.Cal. 1978) 452 F.Supp. 802. At issue in Judge MacBride's opinion was whether a dismissal under 28 U.S.C. § 1915(d) was inappropriate in an action challenging the con-

stitutionality of a section of the Federal Election Campaign Act, 2 U.S.C. § 431. Section 437h of the Act provides a unique mechanism for challenges to the Act's constitutionality, providing for District Court certification, and immediate empanelment of an en banc Court of Appeals which would then be required to "expedite to the greatest possible extent" the action. Judge MacBride concluded that a 28 U.S.C. § 1915(d) frivolity dismissal is not precluded by Section 437h of the Election Campaign Act.

Plaintiff appealed the dismissal. Without reaching the merits of Judge MacBride's opinion, the Ninth Circuit remanded "for consideration of whether the litigation presents a justiciable case or controversy and, if so, whether the proper parties have been served." In his subsequent memorandum of August 27, 1978, Judge MacBride reviewed his earlier opinion, found that a justiciable case or controversy existed, and explained that, although the defendant named in the complaint was probably not the proper defendant, he did not reach these issues because of the need to expedite the matter, and because of the frivolous nature of the action. Since no other instructions were included in the remand order, Judge MacBride had a copy of his memorandum transmitted to the Ninth Circuit as a supplement to the existing record on appeal.

Eight months later the Ninth Circuit dismissed the action because "no action was commenced against a proper party."

On March 19, 1980, plaintiff filed the instant action with this court. The complaint is identical to the complaint filed in Civil S-78-249, except that this time plaintiff has arguably named the proper defendant. Plaintiff again has filed for in forma pauperis status. Judge Schwartz was

originally assigned the application but recused himself.

Once again, in forma pauperis status is appropriate because of Mr. Gifford's indigency. The action, however, remains legally frivolous.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's application to proceed in forma pauperis is granted;

2. The Court finds that the action is legally frivolous under 28 U.S.C. § 1915(d) for the reasons expressed in Gifford v. Congress (E.D. Cal. 1978) 452 F.Supp. 802;

3. The action is therefore dismissed.

DATED: 4/16/85

LAWRENCE K. KARLTON
Judge, U.S.District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

HOWARD L. GIFFORD,

Plaintiff,

vs.

THE CONGRESS,

Defendant.

CIVIL NO. S-78-249

MEMORANDUM

On July 31, 1979, the Ninth Circuit remanded the above referenced action to this court, stating in full:

> Upon due consideration of appellant's letters and motions and the record on appeal, this appeal is hereby remanded to the district court for consideration of whether the litigation presents a judicable case or controversy and, if so, whether the proper parties have been served.

The history of this action is set forth in detail in this court's earlier decision, Gifford v. Congress, 452 F. Supp. 802 (E.D. Cal. 1978), and it need not be discussed at length herein. Plaintiff challenged the constitutionality of a portion of the Federal Election Campaign Act, specifically 2 U.S.C. §§ 431(b)(2). Section 431 of the Act defines the term "candidate" as "an individual who seeks nomination for election, or election, to Federal office" and declares that an individual shall be deemed one seeking nomination or election if he has

> (1) taken the action necessary under the law of a State to qualify himself for

> nomination for election, or election to Federal office, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election to such office.

Plaintiff contended that section 431(b)(2) is unconstitutional on the ground that Congress lacks the authority to regulate the campaign activities of a "private citizen" who has not officially qualified as a candidate within the meaning of section 431(b)(1).

Because plaintiff sought to proceed in forma pauperis[1/] pursuant to 28 U.S.C. § 1915(d), this court was obligated to consider the merits of that constitutional challenge. For the reasons set forth in this court's earlier decision, the challenge is without merit and, accordingly, this court dismissed the complaint as frivolous[2/] within the meaning of section 1915(d).

1/ In his Notice of Appeal, plaintiff states in part:

> In how many cases filed do you underline 'this case was filed and costs paid for' as you do underline in forma pauperis on each and every occasion where these three words are used and used lavishly by this court and underlined in every instance as if it was a crime to draw attention to.

By way of explanation, the underlining of which plaintiff complains is required by the rules of style and grammar to which this court has always adhered because these words are of Latin origin. This court intended no derogatory implication by the use of underlining which is the recognized substitute for italics.

2/ In another portion of his Notice of Appeal, plaintiff declares:

> More obviously this court is using and abusing the privilege afforded under Section 1915(d) to dismiss the case if the allegation is judged frivolous ...
>
> Frivolous is to lack seriousness or sense or of little worth or importance. Foolish, trifling or petty. The plaintiff has not used any of these and resents the fact the District Court so states.

The term "frivolous" in section 1915(d) has a very specialized meaning in a judicial setting, as explained in this court's earlier decision. The fact that an argument or a constitutional challenge may be legally frivolous does not in any way indicate that the party offering that argument or making that challenge is not wholly serious concerning the importance of his position. Although this court was and is convinced that plaintiff's challenge is legally frivolous, this court does not wish to be understood as considering the challenge to be petty or foolish.

The difficult question with which this court grappled was not whether the constitutional challenge was meritorious but was whether the provisions of section 437h of the Federal Election Campaign Act supersede the provisions of section 1915(d). Section 437h provides in part for actions to be filed in the district court

> as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the court involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h(a). Subsection (b) provides for a direct appeal to the Supreme Court from any such decision by a court of appeals. Subsection (c) provides:

> It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a) of this section.

Id. § 437h(c). The certification and appeal procedure mandated by section 437 is extraordinary. After an examination of the legislative history and the relevant cases discussing the section, this court concluded that the certification procedure was not intended to supersede the provisions of the in forma pauperis statute, section 1915(d). Based on that conclusion, this court dismissed plaintiff's action as frivolous pursuant to section 1915(d). This court did, however, authorize plaintiff to proceed on appeal in forma pauperis, by an Order filed June 21, 1978, in order that the difficult question of the interrelation between section 437h and section 1915(d) and the subsidiary question of the frivolity of the complaint might be considered without delay by the Ninth Circuit.

The complaint raised certain questions not considered in detail by this court because of the need to proceed

promptly with the decision on the merits in view of the impending primary and general elections in which plaintiff sought to be a candidate. For that reason, this court did not reach such possible grounds for dismissal as plaintiff's failure to allege specifically in his amended complaint that he was an "individual eligible to vote in any election for the office of President of the United States" within the requirements of section 437h. See Gifford v. Congress, supra at 810 n.15. Similarly, this court did not discuss the propriety of an action naming "The Congress" as the defendant. Serious questions, potentially fatal questions, can be raised as to the viability of an action against the Congress eo nomine. This court chose not to reach those issues because they could be cured by amendment, albeit at the cost of considerable delay. Other challenges have been brought against congressional officials, e.g., Socialist Workers 1974 National Campaign Committee v. Jennings, 567 F.2d 1133 (D.C. Cir. 1977) (naming the Clerk of the House of Representatives and the Secretary of the Senate as two of the defendants), and still others against the Federal Election Commission itself, id. at 1133 n.1 (noting that plaintiffs had amended their complaint to name the Commission as a defendant); Martin Tractor Co. v. Federal Election Commission, 460 F.2d 1017 (D.D.C. 1978)(naming the Commission and its members as defendants). Had this court deemed the challenge not to be frivolous, then it would have been faced with the necessity of determining the proper defendant or defendants to be served. Because the complaint was dismissed as frivolous, however, no service was authorized and there was no purpose in a requirement that plaintiff amend his complaint. Such an amendment would have been a futile gesture. Thus, the second question presented to this court by the Ninth Circuit in its remand can be answered easily: no parties

have been served because this court ruled the complaint frivolous and so declined to authorize service pursuant to 28 U.S.C. § 1915(d). The defendant named in the complaint is, in all probability, not a proper defendant, but that defect could be easily cured prior to service if service were to be authorized in the future.

The first of the two questions presented by the Ninth Circuit raises more difficult issues. The Ninth Circuit remanded for consideration of whether this litigation presents a "judicable case or controversy." This court understands that question to be directed to the possible mootness of the issues presented in the complaint.[3/] Plaintiff declared in his original complaint that he sought to appear on the June 1978 primary election ballot. This court rendered its decision from which plaintiff appealed on June 5, 1978, although the decision was filed on June 6, 1978, the date of the primary election. At the time of the decision, then, the case was not moot. Between the time of the primary election and the general election on November 7, 1978, the matter could not reasonably be considered moot because of the possibility that plaintiff might be accorded some relief in connection with the general election, assuming that this court's decision were to be reversed in the interim. The question of mootness arises because, once the general election was held in November 1978,

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3/ A number of interrelated doctrines fall within the concept of justiciability, including the mootness doctrine on which this court will focus. Although the Ninth Circuit did not specifically refer to mootness, this court is unable to perceive that any of the other doctrines falling within the concept of justiciability are relevant to the case. Obviously, plaintiff has standing to sue; his own candidacy was at issue. The matter was fully ripe when presented to this court. This case does not require the court to decide a political question within the specialized legal meaning of that phrase. See Baker v. Carr, 7 L. Ed. 2d 663 (1962). Plaintiff does not seek an advisory opinion. This is not a feigned or collusive case.

no possible relief was available for plaintiff in connection with that election.

This court would not hesitate to deem the matter moot had plaintiff sought injunctive relief with reference to the 1978 election. Plaintiff, however, sought declaratory relief. There exists a long line of Supreme Court cases involving election disputes in which the issue under litigation was not presented to the Court until months or years after the particular election in which it arose. In these cases, the Court has declined to dismiss the appeals on the basis of mootness because the disputes were capable of repetition yet evading review. For example, in Storer v. Brown, 39 L. Ed. 2d 714, 727 n.8 (1974), the Supreme Court considered the merits of a challenge to a number of state statutory prerequisites for inclusion on the ballot. The Court declared:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." Rosario v Rockefeller, 410 US 752, 756 n 5, 36 L Ed 2d 1, 93 S Ct 1245 (1973) ....

Similarly, in Rosario v. Rockefeller, 36 L. Ed. 2d 1, 6 n.5 (1973), the Court considered a challenge to certain requirements for voting in primary elections. The Court held:

> Although the June primary election has been completed and the petitioners will be eligible to vote in the next scheduled New York primary, this case is not moot, since the question the petitioners raise is "capable of repetition, yet evading review." Dunn v. Blumstein, 405 US 330, 333 n 2, 31 L Ed 2d 274, 92 S Ct 995 (1972) ....

Accord, Brown v. Chote, 36 L. Ed. 2d 420, 425 n.4 (1973)

The exception to the mootness doctrine expressed in these cases has been applied not only in election disputes but also in other types of litigation. In 1975, the Supreme

Court announced a limitation on the capable of repetition exception in Weinstein v. Bradford, 46 L. Ed. 2d 350 (1975), a prisoner's rights case. In Weinstein, the litigation centered on the procedural rights to be accorded to a prisoner eligible for parole; the prisoner-plaintiff in the action had been completely released from supervision before the case reached the Supreme Court. The Court held:

> in the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements [are] combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element. When [defendants] will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number.

Id. at 353, citing Sosna v. Iowa, 42 L. Ed. 2d 532 (1975). See also Bell v. Wolfish, 60 L. Ed. 2d 447, 460 n.5 (1979) (action concerning the rights of pretrial detainees not mooted by termination of the claims of the class representatives).

The Supreme Court has not applied the Weinstein limitation in the post-1975 election dispute case of Mandel v. Bradley, 53 L. Ed. 2d 199 (1977). The Mandel plaintiff had been denied a place on the primary election ballot for failure to obtain the requisite number of valid nomination signatures in the required time period. He sued for injunctive and declaratory relief, contending that the requirements were formulated in a manner which denied him his constitutional rights, and a three-judge district court ordered that he be accorded an additional 53 days following the primary election in which to obtain the signatures for placement of his name

on the general election. The matter was appealed to the Supreme Court which noted that, during the additional 53 days, the plaintiff "successfully gathered the requisite number of signatures, obtained a place on the ballot, ran, and lost." Id. at 204 n.1. Nevertheless, the Supreme Court held that the case was not moot, citing Storer v. Brown, supra, and proceeded to rule on the merits, remanding the case for further proceedings in the district court. The Court did not discuss the question whether there existed a reasonable expectation that the plaintiff would again seek nomination and election in the state. If anything, the Mandel facts present a stronger case for a conclusion that the dispute is moot than do the facts in the instant action in which the plaintiff never appeared on the ballot. Having run and lost, the Mandel plaintiff might never wish to seek election again.

In a carefully reasoned decision, the Fifth Circuit en banc has concluded that the Weinstein limitation is not applicable in election cases such as the instant action. In Morial v. Judiciary Commission, 565 F.2d 295 (5th Cir. 1977), cert. denied, 56 L. Ed. 2d 395 (1978), the court was faced with a challenge to the constitutionality of a Louisiana statute and canon of ethics which required a judge to resign from the bench in order to run for elective non-judicial office. The district court held that the statute and canon violated the First and Fourteenth Amendments, a decision whose effect was stayed by the Fifth Circuit pending a ruling on the merits. While that stay was in effect, but prior to the election, the plaintiff resigned his judgeship; litigation proceeded in state court during this period and culminated in a decision that the plaintiff was validly a candidate for election. The plaintiff was elected Mayor of New Orleans on November 12, 1977, a month prior to the Fifth Circuit's ruling. The court

declared:

> The parties to this suit agree that the case is not moot notwithstanding these events. We concur. Suits challenging the validity of state election laws are classic examples of cases in which the issues are "capable of repetition, yet evading review." The Supreme Court has decided a number of such cases after the challenged election had already taken place and no request for retrospective relief could be granted. [citations omitted]. In none of these cases was the suit brought as a formal class action; nor did the Court pause to consider whether the particular plaintiff would be subject to future harm....
>
> While at one time it seemed that the Storer approach had been cast aside by the Court in Sosna v. Iowa [and Weinstein v. Bradford], a case decided last term demonstrates that Storer retains full validity. In Mandel v. Bradley, ... the Court held, citing Storer, that a challenge to a Maryland candidate qualification requirement was not moot notwithstanding the fact that the plaintiff had, while under the protection of a district court injunction, "successfully gathered the requisite number of signatures, obtained a place on the ballot, ran, and lost" prior to the Court's decision.... We believe that this pronouncement of the Supreme Court in a case so very closely analogous to that at bar must govern. The pace of reasoned constitutional adjudication, these cases show, is not parametric with that of election campaigns.

Id. at 297-98 n.3. The reasoning set forth by the Fifth Circuit is persuasive, and this court perceives no other conclusion on the record before it but to hold that the action is not moot. Accordingly, this court answers the first of the two questions posed by the Ninth Circuit by concluding that this action presents a justiciable case of controversy.

The Ninth Circuit's remand gives no direction as to the action to be taken once this court has completed the consideration requested. Under all the circumstances, the most appropriate course is to order the Clerk of this Court to transmit the necessary number of copies of this Memorandum to the Ninth Circuit as a supplement to the existing record which is on appeal.

IT IS SO ORDERED.

DATED: August 27, 1979.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U.S. Court of Appeals & Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, CA 94101

March 29, 1982

RECEIVED
MAY 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. Howard L. Gifford
5021 Harrison Street
North Highlands, CA 95660

RE: No. 80-4211 - Gifford v. Tiernan

Dear Mr. Gifford,

Filed copy of Notice of Appeal in the above case is enclosed.

We have received your request to certify and transmit this court's record of your case to the Supreme Court of the United States.

Rules 13.1 and 19.1 of the Supreme Court provide that the record shall be transmitted when the Supreme Court determines that the record is needed. We have made arrangements with the Clerk of the Supreme Court to advise us immediately when such a determination is made. Please be assured that at that time the complete record will be transmitted without delay.

Very truly yours,
Phillip B. Winberry
~~RICHARD~~
Clerk of Court

BY Patricia Namekawa
Patricia Namekawa
Deputy Clerk

CA9-048 (5/13/80)

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(12) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (5) it may petition the court for an order to adjudicate such person in civil contempt, except that if it believes the violation to be knowing and willful it may petition the court for an order to adjudicate such person in criminal contempt.

(b) In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

(c) Any member of the Commission, any employee of the Commission, or any other person who violates the provisions of subsection (a)(3)(B) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subsection (a)(3)(B) shall be fined not more than $5,000.

§437h. Judicial review

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the

Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

§438. Administrative and judicial provisions

(a) *Duties.* It shall be the duty of the Commission –

(1) *Forms.* To develop and furnish to the person required by the provisions of this Act prescribed forms for the making of the reports and statements required to be filed with it under this chapter;

(2) *Manual for uniform bookkeeping and reporting methods.* To prepare, publish, and furnish to the person required to file such reports and statements a manual setting forth recommended uniform methods of bookkeeping and reporting;

(3) *Filing, coding, and cross-indexing system.* To develop a filing, coding, and cross-indexing system consonant with the purposes of this chapter;

(4) *Public inspection; copies; sale or use restrictions.* To make the reports and statements filed with it available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day following the day during which it was received, and to permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person: *Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(5) *Preservation of reports and statements.* To preserve such reports and statements for a period of 10 years from date of receipt, except that reports and statements relating solely to candidates for the House of Representatives shall be preserved for only 5 years from the date of receipt;

(6) *Index of reports and statements; publication in Federal Register.* To compile and maintain a cumulative index of reports and statements filed with it, which shall be published in the Federal Register at regular intervals and which shall be available for purchase directly or by mail for a reasonable price; and to compile and maintain a separate cumulative index of reports and statements filed with it by political committees supporting more than one candidate, which shall include a listing of the date of the registration of any such political

81 6871

HOWARD L. GIFFORD
5021 Harrison Street
North Highlands, CA 95660
Telephone: 916/334-4701
Acting In Pro Per In FORMA PAUPERIS

RECEIVED
MAR 29 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

HOWARD L. GIFFORD,
Petitioner/Appellant
vs.
ROBERT O. TIERNAN, CHAIRMAN, FEDERAL ELECTION COMMISSION,
Appellee.

MOTION TO PROCEED IN FORMA PAUPERIS

RECEIVED
MAY 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioner, Howard L. Gifford, a below poverty level pensioner, asks leave to file the attached Notice Of Appeal to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this petition is attached hereto.

DATED: March 25, 1982

Howard L Gifford
HOWARD L. GIFFORD, In Pro Per, In FORMA PAUPERIS

UNITED STATES ~~DISTRICT COURT~~

~~EASTERN DISTRICT OF CALIFORNIA~~

SUPREME COURT

HOWARD L. GIFFORD,
Petitioner/Appellant

vs.

ROBERT O. TIERNAN, CHAIRMAN
FEDERAL ELECTION COMMISSION,
Appellee

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, HOWARD L. GIFFORD, depose and say that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further declare that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? YES ( ) NO (X)
   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   /

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

   March of 1961 (Don't have records any longer)

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? YES ( ) NO (XX)
   b. Rent payments, interest or dividends? YES ( ) NO (XX)
   c. Pensions, annuities or life insurance payments? YES (XX) NO ( )
   d. Gifts or inheritances? YES ( ) NO (XX)
   e. Any other source? YES ( ) NO (XX)

   If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

Self - DISABILITY PENSION	$293 monthly
Wife	$293 monthly

3. Do you own any cash, or do you have money in a checking or savings account?

   YES ( ) NO (XX)
   If the answer is "yes", state the total value of the items owned.

4. Do you own estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   YES ( ) NO (XX)

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. Wife and I share expenses because the Disability Pension is split

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury, and I declare under penalty of perjury that the foregoing is true and correct.

Executed at N. Highlands, Sacramento, California (City, county, state) on March 25, 1982 (Date)

Edward L Gifford
(Movant's signature)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, County of Sacramento, State of CA. I am over the age of eighteen years and not a party to the within above entitled action. My address is 5021 Harrison St., North Highlands, CA 95660.

On this date I served the within APPENDIX, by placing a true copy thereof enclosed in a sealed envelope with the postage thereon fully prepaid, in the U.S. Post Office Mail box at North Highlands, CA addressed to:

Robert O. Tiernan, et al.
c/o Charles N. Steele, General Council
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

I declare under penalty of perjury the foregoing is true and correct.

DATED: May 3, 1982

Barbara M. Gifford
BARBARA M. GIFFORD

If the answer is "yes", describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

Wife and I share expenses because the Disability Pension is split

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury, and I declare under penalty of perjury that the foregoing is true and correct.

Executed at W. Highlands, Sacramento, California (City, county, state) on March 25, 1982 (Date)

Richard L Gifford
(Movant's signature)